

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SUZIE E. GONZALEZ,

Defendant and Appellant.

B269136

(Los Angeles County
Super. Ct. No. MA057107)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed.

Maxine Weksler, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Suzie E. Gonzalez (Gonzalez) appeals from the order denying her motion to set aside or, in the alternative, reduce fines imposed after she pled no contest to attempted first degree burglary. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gonzalez was charged by information filed on September 12, 2012, with attempted first degree burglary. (Pen. Code, § 664, 459.)¹ On November 6, 2012, Gonzalez pled no contest and was placed on formal probation for three years. The appellate record does not include a Reporter's Transcript of the proceedings, the Probation Officer's Report or any plea entry form signed by Gonzalez. According to the minute order, the trial court assessed the following fines and fees: a \$40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)); a \$30 criminal conviction assessment (Gov. Code, § 70373); a \$10 crime prevention fine (Pen. Code, § 1202.5); a \$240 probation revocation restitution fine (Pen. Code, § 1202.44); a \$240 victim restitution fine (Pen. Code, § 1202.4, subd. (b)); and victim restitution in an

¹ All future undesignated statutory references are to the Penal Code.

Gonzalez was jointly charged with John Randy Gonzalez, who was also charged with misdemeanor vandalism; prior conviction and/or prior prison term enhancements were alleged only as to John (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) (Three Strikes); § 667, subd. (a)(1); and § 667.5, subd. (b)). John is not a party to this appeal.

amount to be decided by her probation officer (Welf. & Inst. Code, § 279). The trial court also ordered the probation officer to determine Gonzalez's ability to pay all or a portion of the reasonable costs of her probation services (COPS) as mandated by Penal Code section 1203.1b, subdivision (a) (Pen. Code, § 1203.1b, subd. (a)).

In December 2012, a financial evaluator concluded that Gonzalez did not have the financial ability to pay the cost of legal services provided by the public defender. (See § 987.81, subd. (b).) There is no indication in the record whether or not this same evaluator assessed Gonzalez's ability to pay the COPS. But according to a Supplemental Probation Officer's Report prepared in October 2015, the probation officer had determined Gonzalez was able to pay COPS in the amount of \$3,558 and set a \$25 per month payment schedule. (See § 1203.1b, subd. (d) [authorizing probation officer to set a monthly payment schedule].) In addition to the COPS assessment, Gonzalez was assessed a \$50 collection installment fee, a \$24 restitution fine service charge and a \$240 restitution fine, for a total of \$3,872. The appellate record includes only the Supplemental Probation Officer's Report, not the report reflecting the probation officer's original determination of Gonzalez's ability to pay the COPS.

Almost three years later, in July 2015, Gonzalez had paid just \$59 of the \$3,872 assessment. Gonzalez filed a written

motion to set aside or, in the alternative, reduce the \$3,872 assessment. The gist of the motion was that (1) pursuant to section 1203.1b Gonzalez was entitled to an “ability to pay” hearing; (2) in making the “ability to pay” determination, the trial court could consider Gonzalez’s “[r]easonably discernible future financial position” for no more than the one year from the date of the hearing; and (3) neither her ability to pay nor her actual payment of probation fees could be the basis of an adverse finding in probation. Gonzalez argued that, “if society’s interests are to be considered at all, and the desire is to keep [Gonzalez] out of a life of crime and theft, it’s hard to imagine a less fruitful manner of achieving that goal by saddling her with such a monstrous debt at the time of her greatest vulnerability but after she has successfully managed to stay out of trouble for the last 3 years.”

At the July 29, 2015, hearing on the motion, Gonzalez stated she had only recently obtained employment and since then had made two payments. The trial court referred Gonzalez to the financial evaluator and set the matter for an “ability to pay” hearing in August 2015. At that hearing, the trial court continued the matter to November 3, 2015, because Gonzalez had not correctly filled out a form seeking information about her financial situation. For the continued hearing, the trial court ordered Gonzalez to “bring me her taxes from last year, 2015, and

I want her to bring me any bank accounts she's had for the last six months even if they're closed, and properly fill this out of everything she owes, if anything." The trial court also ordered Gonzalez to "bring me her paystubs for the, last three months. Bring me any credit card – any credit cards, her receipts for her rent, bring me her payments, how she pays her utilities or how that's paid, and a copy of any bank account she's had in the last six months every month even if they were cancelled up until the time they were cancelled."

According to the October 2015 Supplemental Probation Officer's Report, Gonzalez had by then made payments totaling \$74, leaving a balance due of \$3,798. The probation officer recommended that \$3,872 "be deemed a cost of probation services judgment, that [Gonzalez] be given credit for all payments made to date; that probation be terminated without the benefit of reduction or dismissal."

After resolving some confusion about the date of the continued ability to pay hearing, a financial evaluation was set for 10:00 a.m. October 26, 2015. Prior to the evaluation, Gonzalez informed the evaluator that she could not attend because "she had a situation with her mother." The evaluator agreed to see Gonzalez later that afternoon. Gonzalez appeared at the rescheduled time but without "all the documentation needed." The evaluation was rescheduled to 2:30 p.m. on

October 28, 2015. Gonzalez appeared but “again, did not have all the documents needed to complete the financial evaluation.” The evaluator told Gonzalez to come back at 4:30 with the necessary paperwork. Gonzalez did not do so.

The appellate record does not include a copy of the financial evaluator’s report, or any of the supporting documents. At the hearing on November 3, 2015, the trial court agreed to review additional financial records which Gonzalez did not show the evaluator but brought to the hearing.² These financial records are not included in the appellate record. We glean the following from comments the trial court made about the evaluator’s report and the additional financial documents it reviewed at the hearing. Gonzalez provided the evaluator with copies of her 2013 and 2014 tax returns. In 2013, Gonzalez earned “other income”

² The trial court observed that defendant was given multiple opportunities to provide the financial evaluator with the necessary documents, but instead wanted “to hand the court a stack full of papers” at the hearing. Defense counsel conceded that defendant had been told in September what documents she needed for the meeting with the financial evaluator, but argued the delay in obtaining the documents was the fault of the probation department because it had misinformed defendant of the date of the hearing; by the time that error was resolved, defendant had just one week to collect the necessary paperwork; she compiled most of the documentation in time for her meeting with the financial evaluator, and had compiled the remaining documents by the time of the hearing.

in the amount of \$4,232 and received a \$1,303 tax refund. In 2014, Gonzalez's total income was \$10,511, apparently including "other income" in an unspecified amount and a \$1,598 tax refund. By the time of the hearing, Gonzalez was on track to earn at least \$12,151 per year comprised of \$2,328 from CalFresh³ (\$194 per month) and about \$9,823 per year from the state of California for acting as her mother's caretaker (\$377 every two weeks). Gonzalez provided the trial court with a copy of the lease for the home she shared with her mother and niece; according to the lease, the monthly rent was \$1,220; a letter from Gonzalez's mother stated that Gonzalez paid \$550 of that amount (the trial court commented that it was more likely that Gonzalez paid one-third of the total rent obligation, about \$400); Gonzalez also paid the trash bill but there is no indication of the amount or frequency of that bill. Gonzalez gave the trial court copies of bank statements from a closed account; defense counsel explained that Gonzalez did not provide the bank statements to the financial evaluator because Gonzalez did not receive them until the day before the hearing.

³ Formerly known as the Food Stamp Program, CalFresh, provides monthly benefits to low-income households that can be used for the purchase of food. (Welf. & Inst. Code, § 18900 et seq.) In her Reply Brief, Gonzalez asserts that eligibility for CalFresh requires monthly income of no more than \$973.

Gonzalez also gave the trial court copies of her credit reports. In response to defense counsel's statement that Gonzalez had "\$18,389 in judgments or collections against her," the trial court observed: "With respect to the amounts owed, most of which are in collections so that will be a matter of pay when she's able. That's not something she has to pay currently. Some of the balances are written off as losses . . . for example, Verizon; the HBC tax paid, zero balance, the original amount was [\$]400 that's listed on there but installment on her installment account, the balance was written off. This was a charge off on SCE and the current balance is \$44. Most of the things are in collections." The trial court referred to Gonzalez's "traffic debts," which we understand to mean unpaid traffic tickets; there is nothing in the record to show the amount of the so-called "traffic debts"; the trial court suggested Gonzalez apply for an amnesty program that would allow her to pay the "traffic debts" over time.

The trial court stated that, including the CalFresh payments, the evaluator concluded Gonzalez's net disposable income was \$215.⁴ The evaluator recommended that mother continue to pay. Before it had reviewed the additional financial

⁴ The trial commented that defendant was "currently working, taking care of her mother, but that's not a full-time job, and I do find that she's capable of earning funds to pay the victim back." We note that the issue at the hearing was not victim restitution. It was defendant's ability to pay all or part of the cost of her probation services.

records, the trial court stated that, based on the evaluator's report, Gonzalez had the ability to pay because she had the ability to work and earn money. After reviewing the additional financial records, the trial court concluded that Gonzalez "has the prospective" ability to pay the probation services assessment. In response to defense counsel asking if the trial court was making a finding that Gonzalez could pay the balance in one year, the trial court stated: "That she has the ability to pay it down to the best of her ability. I can revisit it if she cannot complete it in one year because we can revisit that."

The trial court entered judgment in favor of the probation department and against Gonzalez for the \$3,798 balance due. Gonzalez timely appealed. We affirm.

DISCUSSION

A. Sufficiency of the Evidence

Gonzalez contends there was insufficient evidence to support the finding that she had the ability to pay the \$3,798 balance due on the \$3,872 assessment, which included a \$240 restitution fine pursuant to section 1202.4 and a \$3,558 COPS assessment pursuant to section 1203.1b. She argues this is because the trial court "failed to consider undocumented but necessary expenses for [Gonzalez's] sustenance (e.g., food) and maintaining a livelihood (e.g., transportation and a telephone – the latter an essential tool for finding other employment, as

anticipated by the court)” (Footnote omitted.) The People counter that (1) the \$240 restitution fine is mandatory without regard to defendant’s ability to pay (§ 1202.4, subd. (b)); (2) Gonzalez forfeited any challenge to that fine by failing to object at the time of sentencing; and (3) there was sufficient evidence that Gonzalez had the ability to pay the \$3,558 COPS assessment. In her reply brief, Gonzalez does not counter the argument vis-a-vis the \$240 restitution fine. We find no error.

1. Section 1202.4

“In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.” (§ 1202.4(b).) “The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine.” (§ 1202.4(c).) At the time of Gonzalez’s sentencing hearing in November 2012, the restitution fine for conviction of a felony could be no less than \$240. (§ 1202.4(b)(1).) Failure to object to the restitution fine at or before sentencing constitutes a waiver of the issue on appeal. (*People v. Villalobos* (2012) 54 Cal.4th 177, 181.)

Here, at the plea hearing on November 6, 2012, the trial court ordered Gonzalez to pay the minimum \$240 restitution fine pursuant to section 1202.4. Gonzalez did not object. Accordingly, she has waived any appellate challenge to that portion of the \$3,872 assessment. We turn next to the remainder of the assessment, including the \$3,558 COPS assessment.

2. Section 1203.1b

“In any case in which a defendant is granted probation . . . the probation officer . . . shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision” (§ 1203.1b, subd. (a).)

Section 1203.1b “requires a trial court to order a probationer to pay the cost of probation supervision, provided the probationer has the ability to pay.” (*People v. Washington* (2002) 100 Cal.App.4th 590, 595.) It reflects a legislative policy to conserve public funds by “ ‘shifting the costs stemming from criminal acts back to the convicted defendant.’ [Citation.]” (*Id.* at p. 593.)

The term “ability to pay” is defined in subdivision (e) of section 1203.1b as the defendant’s “overall capability . . . to reimburse the costs, or a portion of the costs, of . . . probation supervision” (§ 1203.1b, subd. (e).) Relevant considerations include but are not limited to the defendant’s present financial condition, “reasonably discernable future financial position” for no more than one year after the hearing, the likelihood that the

defendant will obtain employment within that one year and any other factors that may bear upon the issue. (§ 1203.1b, subd. (e)(1),(2),(3),(4).)

Section 1203.1b describes the procedure for imposing probation supervision fees. (*People v. Trujillo* (2015) 60 Cal.4th 850, 853 (*Trujillo*).) First, the trial court is directed to “order the defendant to appear before the probation officer . . . to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer . . . shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay.”

(§ 1203.1b, subd. (a).) If practicable, the probation officer shall set payments to be made on a monthly basis. (§ 1203.1b, subd. (d).)

But the probation officer does not have the final say in the matter. The probation officer must inform the defendant that the defendant is entitled to a hearing at which the defendant has the right to counsel and in which “the *court* shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.” (§ 1203.1b, subd. (a), *italics added*.) When the defendant fails to waive that right, the probation officer must “refer the matter to the court for the

scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made.” (§ 1203.1, subd. (b).)

At the “ability to pay” hearing in the trial court, the defendant is entitled to an opportunity to be heard in person and to present witnesses and documentary evidence. (§ 1203.1b, subd. (b)(1).) If it determines that the defendant has the ability to pay all or part of the costs, the trial court “shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability.” (§ 1203.1b, subd. (b)(2).) If practicable, the trial court shall order the payments be made on a monthly basis. (§ 1203.1, subd. (d).) During the probationary period, the trial court may hold additional hearings to review the defendant’s ability to pay. (§ 1203.1b, subd. (c).)

The parties have cited to no case, and our independent research has found none, discussing the quantum of evidence necessary to support a finding that a criminal defendant has the ability to pay a COPS assessment. In the context of drug program fees imposed pursuant to Health and Safety Code section 11372.7, subdivision (a), the court in *People v. Staley* (1992) 10 Cal.App.4th 782 (*Staley*), held that ability to pay “does not necessarily require existing employment or cash on hand.”

(*Id.* at p. 785, citing *In re Brian S.* (1982) 130 Cal.App.3d 523, 532 [affirming restitution order based on ability to obtain employment and make future payments].) The issue in *People v. DeFrance* (2008) 167 Cal.App.4th 486 (*DeFrance*), was whether the defendant, who had been sentenced to life in prison plus one year, had the ability to pay a \$10,000 restitution fine.⁵ (*Id.* at p. 505.) The “defendant put forth figures to show, at current prison wages, it would be very difficult for him to pay the fine; it would take a very long time and the fine might never be paid. Defendant did not, however, show an absolute inability to ever pay the fine.” (*Ibid.*)

The ability to pay a restitution fine was also the issue in *People v. Hennessey* (1995) 37 Cal.App.4th 1830, in which the court stated that at “the time of sentencing, defendant was 32 years old. He received his GED (General Education Diploma) while in the Marine Corps from which he received an honorable discharge in 1982. Sporadically employed between 1984 and 1986 as an auto dismantler and mechanic, the court was entitled to infer defendant’s unemployment at the time of his arrest arose from a lifestyle choice. [Citation.] While defendant’s wife reported that defendant received a broken wrist when he was ‘double cuffed’ and will require surgery, the record does not

⁵ Ability to pay is not a reason to not impose this mandatory fine, but it is a consideration in setting the fine above the statutory minimum. (§ 1202.4, subds. (c) & (d).)

suggest this injury completely disabled defendant from all employment either before and most certainly not after the surgery. Hence, the court properly found defendant had the ability to pay the \$4,000 restitution fine.”

3. Analysis

Here, the record on appeal shows that Gonzalez was 24 years old when she entered her no contest plea and was placed on probation in November 2012; she was 27 years old at the time of the November 2015 hearing on her motion. In 2013, Gonzalez earned “other income” in the amount of \$4,232 and received a \$1,303 tax refund. In 2014, her total income was \$10,511, apparently including “other income” in an unspecified amount and a \$1,598 tax refund. By the time of the hearing in November 2015, her monthly income was about \$1,012, comprised of \$194 per month from the CalFresh program and about \$818 from the state of California for acting as her mother’s caretaker. Gonzalez’s expenses included monthly rent of between \$400 and \$550. Since she lived with her mother and niece, it is unclear whether Gonzalez had to pay any utilities other than the trash bill in an unspecified amount. It is also unclear whether she incurred food costs. Although there are references in the record to other expenses, the amounts are not specified.

Under the reasoning of the courts in *Staley, supra*, 10 Cal.App.4th 782, *DeFrance, supra*, 167 Cal.App.4th 486 and

Hennessey, supra, 37 Cal.App.4th 1830, this evidence was sufficient to support the trial court's finding that Gonzalez had the ability to pay \$25 per month towards the \$3,798 unpaid balance of the assessment imposed pursuant to sections 1202.4 and 1203.1b.

B. Abuse of Discretion

Gonzalez contends it was an abuse of discretion for the trial court to find that deferring payment of the \$18,389 of previously incurred debt was a reasonable means to increase the funds she had available to pay the COPS assessment. The flaw in this argument is that the record does not support the assertion that at the time of the hearing Gonzalez actually owed \$18,389 or that she was paying anything to reduce that debt. On the contrary, the trial court said that some of those debts had been "written off as losses" by the providers and others were "in collections." In any event, the trial court did not order Gonzalez to defer any personal debt so there is no order for us to review.⁶

C. The Eighth Amendment

Gonzalez contends imposition of a court fine beyond her ability to pay violates the excessive fine clause of the Eighth Amendment to the United States Constitution. Inasmuch as we

⁶ We have considered Gonzalez's debt in the context of whether there was substantial evidence of her ability to pay the cost of probation served.

have found sufficient evidence of Gonzalez's ability to pay, this contention necessarily fails.

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.